

**STATE OF ILLINOIS**  
**BEFORE THE ILLINOIS COMMERCE COMMISSION**

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Flat Rock Telephone Co-Op	)	
	)	
Petition for Suspension or Modification of	)	Docket No. 04-0181
Section 251(b)(2) requirements of the Federal	)	
Telecommunications Act pursuant to Section	)	
251(f)(2) of said Act; for entry of Interim Order;	)	
and for other necessary relief.	)	

**RESPONSE IN OPPOSITION TO MOTION TO STRIKE**  
**ALL OR PART OF VERIZON WIRELESS' BRIEF**

NOW COMES Verizon Wireless, by and through its attorneys, and respectfully submits its response to the Illinois Commerce Commission (“ICC” or “Commission”) in opposition to Flat Rock Telephone Co-Op’s (“Flat Rock”) Motion to Strike All or Part of Verizon Wireless’ Brief in the above-captioned proceeding and states as follows:

**I. INTRODUCTION**

The schedule established by the Administrative Law Judge (“ALJ”) in this proceeding provided for a single round of simultaneous briefs in this matter.<sup>1</sup> When intervening in this proceeding, Verizon Wireless accepted the established schedule. Now, after simultaneous briefs have been filed, Flat Rock attempts to file a reply brief in the guise of a Motion to Strike Verizon Wireless’ Brief. Not only is Flat Rock’s Motion to Strike inappropriate argument, the points made therein have no basis in law. If the requested relief were granted, not only would Verizon Wireless’ due process rights be violated but this Commission would be denying Illinois

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<sup>1</sup> TR 124; TR 136

consumers a right granted to them by Congress and the Federal Communications Commission (“FCC”)—a right to intermodal local number portability.

It is Flat Rock, and not Verizon Wireless that has the statutory burden of proof in this proceeding. The FCC has ruled:

A LEC with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide must prove to the state commission, pursuant to section 251(f)(2) of the Act, that it is entitled to a suspension or modification of the application of a requirement or requirements of section 251(b) or 251(c) of the Act.<sup>2</sup>

Despite this burden, Flat Rock now moves to strike portions of Verizon Wireless’ brief where Verizon Wireless makes policy arguments and draws legal conclusions. Flat Rock failed to meet its burden to demonstrate that it meets the statutory and regulatory standards for a suspension of its LNP obligations under Section 251(f)(2). Flat Rock, failed to introduce into evidence any facts related to such issues as:

- The impact an additional waiver would have on number pooling and NXX exhaustion;
- Comparisons between Flat Rock and any other rural incumbent local exchange carrier currently offering LNP;
- Comparisons between the amount Flat Rock proposes to charge as an LNP surcharge and any similarly situated carrier; and,
- Attempts Flat Rock has taken to minimize the costs of implementing LNP.

As noted in Verizon Wireless’ brief,<sup>3</sup> this Commission **must** consider these issues in order to make an informed decision regarding whether or not an additional suspension of Flat

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<sup>2</sup> 47 C.F.R. § 51.405(b); *see also Local Competition First Report and Order*, ¶1262.

<sup>3</sup> Verizon Wireless Brief, pp. 7-22.

Rock's obligation to provide LNP "is necessary to avoid significant adverse impact on users of telecommunications services generally."<sup>4</sup>

Flat Rock attempts to strike those portions of Verizon Wireless' brief where Verizon Wireless points out these and other shortfalls. Verizon Wireless does not have the burden to provide this Commission with evidence that would cure these shortfalls.

Flat Rock claims that Verizon Wireless, in its brief, is attempting "to make assertions of purported fact that are [allegedly] unsupported by the record evidence."<sup>5</sup> With limited exceptions, those portions of Verizon Wireless' brief, which Flat Rock seeks to strike do not argue issues of fact, but rather argue policy and legal issues. Flat Rock's Motion to Strike is inappropriate and should be denied in its entirety.

**B. The Timeline in this case has created an overwhelming proceeding**

Flat Rock essentially argues that its Petition should be considered in a vacuum, without any consideration of the other 32 Petitions for waiver from LNP requirements that were filed within days of Flat Rock's, heard the same week as Flat Rock's, and are on the same schedule

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<sup>4</sup> 47 U.S.C. § 251(f)(2)(i).

<sup>5</sup> Flat Rock Motion to Strike, ¶ 1.

for briefing, expected order, and Commission consideration.<sup>6</sup> The Petitioners (24 of which were represented by the same counsel as Flat Rock and 9 of which were represented by a single but different counsel) filed all 33 petitions within days of each other, knowing that this Commission was under a statutory obligation to complete all 33 proceedings in only 180 days.<sup>7</sup>

In light of the scheduling difficulties that 33 simultaneous Petitions posed to the Commission, at the first status hearing, the Parties discussed whether or not it would be better to withdraw some of the petitions and re-file them in a more orderly manner. Flat Rock's counsel indicated he would consider such a proposal.<sup>8</sup> However, Flat Rock, and the 32 other Petitioners, subsequently declined to re-file some of the cases to lighten the load,<sup>9</sup> creating massive burdens on the Commission.

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<sup>6</sup> The 33 Petitions are: Gridley Telephone Company (Docket No. 04-0180), Flat Rock Telephone Co-Op, Inc. (Docket No. 04-0181), Cambridge Telephone Company (Docket No. 04-0182), Henry County Telephone Company (Docket No. 04-0183), LaHarpe Telephone Company (Docket No. 04-0184), Hamilton County Telephone Co-Op (Docket No. 04-0185), McDonough Telephone Company (Docket No. 04-0186), Moultrie Independent Telephone Company (Docket No. 04-0189), Diverse Communications (Docket No. 04-0192), Glasford Telephone Company (Docket No. 04-0193), Viola Home Telephone Company (Docket No. 04-0194), New Windsor Telephone Company (Docket No. 04-0195), Montrose Mutual Telephone Company (Docket No. 04-0196), Woodhull Community Telephone Company (Docket No. 04-0197), Leaf River Telephone Company (Docket No. 04-0198), Oneida Network Services, Inc. (Docket No. 04-0199), Oneida Telephone Exchange (Docket No. 04-0200), McNabb Telephone Company (Docket No. 04-0205), Reynolds Telephone Company (Docket No. 04-0206), Adams Telephone Co-Op (Docket No. 04-0228), Cass Telephone Co (Docket No. 04-0232), Shawnee Telephone Company (Docket No. 04-0236), C-R Telephone Company (Docket No. 04-0237), The El Paso Telephone Company (Docket No. 04-0238), Odin Telephone Exchange, Inc. (Docket No. 04-0239), Yates City Telephone Company (Docket No. 04-0240), Kinsman Telephone Company (Docket No. 04-0243), Stelle Telephone Company (Docket No. 04-0248), Mid Century Telephone Co-Op (Docket No. 04-0249), Wabash Telephone Co-Op (Docket No. 04-0253), Leonore Mutual Tel Company (Docket No. 04-0259), Grandview Mutual Telephone Company (Docket No. 04-0282), and Crossville Telephone Company (Docket No. 04-0283).

<sup>7</sup> 47 U.S.C. § 251(f)(2).

<sup>8</sup> TR 114.

<sup>9</sup> TR 131.

These cases, including Flat Rock, have been fraught with extremely tight deadlines and when taken as a whole, management of the deadlines in the 33 cases, and in the 22 in which Verizon Wireless has intervened,<sup>10</sup> has been difficult. For example, all 33 dockets were scheduled for only 14 days of hearing<sup>11</sup> and the transcript from the evidentiary hearing in this docket was not made publicly available until June 29, 2004, less than a day before the brief in this matter was due.<sup>12</sup>

Now, Verizon Wireless must respond to this Motion to Strike in less than three days.<sup>13</sup> When multiplied by 9<sup>14</sup> or 22<sup>15</sup> the due process concerns are significant.

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<sup>10</sup> Gridley Telephone Company (Docket No. 04-0180), Flat Rock Telephone Co-Op, Inc. (Docket No. 04-0181), Cambridge Telephone Company (Docket No. 04-0182), Henry County Telephone Company (Docket No. 04-0183), LaHarpe Telephone Company (Docket No. 04-0184), Hamilton County Telephone Co-Op (Docket No. 04-0185), Moultrie Independent Telephone Company (Docket No. 04-0189), Glasford Telephone Company (Docket No. 04-0193), Viola Home Telephone Company (Docket No. 04-0194), New Windsor Telephone Company (Docket No. 04-0195), Montrose Mutual Telephone Company (Docket No. 04-0196), Woodhull Community Telephone Company (Docket No. 04-0197), Leaf River Telephone Company (Docket No. 04-0198), Oneida Network Services, Inc. (Docket No. 04-0199), Oneida Telephone Exchange (Docket No. 04-0200), Reynolds Telephone Company (Docket No. 04-0206), Adams Telephone Co-Op (Docket No. 04-0228), Shawnee Telephone Company (Docket No. 04-0236), The El Paso Telephone Company (Docket No. 04-0238), Odin Telephone Exchange, Inc. (Docket No. 04-0239), Yates City Telephone Company (Docket No. 04-0240), and Grandview Mutual Telephone Company (Docket No. 04-0282).

<sup>11</sup> TR 124.

<sup>12</sup> See, ICC E-Docket for ICC Docket No. 04-0181, <<http://eweb.icc.state.il.us/e-docket/>>.

<sup>13</sup> Notice, June 6, 2004.

<sup>14</sup> Nine similar motions to strike were filed and are due on the same day in the following Dockets, Gridley Telephone Company (Docket No. 04-0180), Flat Rock Telephone Co-Op, Inc. (Docket No. 04-0181), LaHarpe Telephone Company (Docket No. 04-0184), Moultrie Independent Telephone Company (Docket No. 04-0189), Reynolds Telephone Company (Docket No. 04-0206), Adams Telephone Co-Op (Docket No. 04-0228), Shawnee Telephone Company (Docket No. 04-0236), Yates City Telephone Company (Docket No. 04-0240), and Grandview Mutual Telephone Company (Docket No. 04-0282).

<sup>15</sup> The number of cases in which Verizon Wireless has intervened.

**C. The filing of a generic brief and comparison between Petitioners was appropriate**

When faced with the task of filing 22 simultaneous briefs, only days after the transcript in each of them had become available, Verizon Wireless chose to file a single brief covering 17 of the Petitions. Though Flat Rock condemns this action, its own counsel noted, when faced with a similar monumental task, “but if there is only so many people around there who have access to the information, you can only do what they can do.”<sup>16</sup> The only substantive difference between each petition is the company size, the company’s proposed LNP Surcharge, the amount to which Staff initially reduced that proposed surcharge (Staff Scenario 1), and the amount to which Staff subsequently reduced that proposed surcharge after elimination of transport and transit charges (Staff Scenario 2). This is evidenced in the testimony filed by the Petitioners and by Staff. Flat Rock’s witness, Kevin J. Jacobson’s testimony, is virtually identical to that filed by other witnesses in the other dockets. In another docket, Staff’s Policy Witness, Jeffrey H. Hoagg, admits that his testimony from case to case is virtually identical:

- Q. Mr. Hoagg, with the exception of the company name and the docket number on this testimony, is there any variation from all of the other versions you filed?
- A. There would be one additional difference in the testimonies and that would relate to the – that would relate to the cost estimates in the case of each company.<sup>17</sup>

However, as Flat Rock objects to the use of cross-examination from other cases, a simple side-by-side examination of Mr. Hoagg’s testimony in Flat Rock<sup>18</sup> to his testimony in any of the other 32 cases easily demonstrates that they are virtually identical. Staff’s cost witness, Robert F.

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<sup>16</sup> TR 110; Flat Rock’s counsel was faced with responding to Data Requests in 24 dockets on a short timeframe.

<sup>17</sup> The El Paso Telephone Company (Docket No. 04-0238), TR 248.

<sup>18</sup> Staff Exhibit 1.0.

Koch, also presents virtually identical testimony in this docket to that which he presented in the other dockets in which he testified; only the company name, docket number, and specific cost data is different.<sup>19</sup> And, a side-by-side comparison of the testimony of Staff's other cost witness, Mark A. Hanson, demonstrates that his testimony is almost indistinguishable from Mr. Koch's testimony on the same subject.<sup>20</sup> Thus, what Verizon Wireless believes are the only substantive differences between each of the 17 Petitioners included in Verizon Wireless's consolidated brief can be summarized on a table, included on page 33 of Verizon Wireless' Brief:

**Table 1**  
**Comparison of Petitioner's Cost Analyses:**

Petitioner	Docket No.	Cost per month per access line per month	Staff Witness	Staff Scenario 1 Cost per access line per month	Staff Scenario 1 Percentage Markup for Residential Customers	Staff Scenario 2 Cost per access line per month	Staff Scenario 2 Percentage Markup for Residential Customers
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<sup>19</sup> Staff Exhibit 3.0., Mr. Koch testified in Gridley Telephone Company (Docket No. 04-0180), Flat Rock Telephone Co-Op, Inc., (Docket No 04-0181), Cambridge Telephone Company, (Docket No 04-0182), Henry County Telephone Company, (Docket No 04-0183), LaHarpe Telephone Company, (Docket No 04-0184), Hamilton County Telephone Co-Op, (Docket No 04-0185), McDonough Telephone Company, (Docket No 04-0186), Moultrie Independent Telephone Company, (Docket No 04-0189), Diverse Communications, (Docket No 04-0192), Glasford Telephone Company, (Docket No 04-0193), Viola Home Telephone Company, (Docket No 04-0194), New Windsor Telephone Company, (Docket No 04-0195), Montrose Mutual Telephone Company, (Docket No 04-0196), Woodhull Community Telephone Company, (Docket No 04-0197), Leaf River Telephone Company, (Docket No 04-0198), and Oneida Network Services, Inc., (Docket No 04-0199).

<sup>20</sup> Mr. Hanson testified in Oneida Telephone Exchange, (Docket No 04-0200), McNabb Telephone Company, (Docket No 04-0205), Reynolds Telephone Company, (Docket No 04-0206), Adams Telephone Co-Op, (Docket No 04-0228), Cass Telephone Co, (Docket No 04-0232), Shawnee Telephone Company, (Docket No 04-0236), C-R Telephone Company, (Docket No 04-0237), The El Paso Telephone Company, (Docket No 04-0238), Odin Telephone Exchange, Inc., (Docket No 04-0239), Yates City Telephone Company, (Docket No 04-0240), Kinsman Telephone Company, (Docket No 04-0243), Stelle Telephone Company, (Docket No 04-0248), Mid Century Telephone Co-Op, (Docket No 04-0249), Wabash Telephone Co-Op, (Docket No 04-0253), Leonore Mutual Telephone Company, (Docket No 04-0259), Grandview Mutual Telephone Company, (Docket No 04-0282), and Crossville Telephone Co, (Docket No 04-0283).

Petitioner	Docket No.	Cost per month per access line per month	Staff Witness	Staff Scenario 1 Cost per access line per month	Staff Scenario 1 Percentage Markup for Residential Customers	Staff Scenario 2 Cost per access line per month	Staff Scenario 2 Percentage Markup for Residential Customers
Adams Tel. Co-Op	04-0228	\$2.99	Hanson	\$2.74	12.99%	\$2.06	9.76%
Flat Rock Tel. Co-Op, Inc.	04-0181	\$3.37	Koch	\$2.30	8.64%	\$2.18	8.21%
Glasford Tel. Co.	04-0193	\$2.11	Koch	\$1.44	8.49%	\$1.06	6.24%
Grandview Mutual Tel. Co.	04-0282	\$8.99	Hanson	\$3.93	13.58%	\$3.56	12.30%
Gridley Tel. Co.	04-0180	\$2.10	Koch	\$1.30	4.66%	\$0.94	3.38%
LaHarpe Tel. Co.	04-0184	\$2.31	Koch	\$1.65	6.46%	\$0.82	3.19%
Leaf River Tel. Co.	04-0198	\$3.57	Koch	\$2.11	6.72%	\$1.63	5.19%
Montrose Mutual Tel. Co.	04-0196	\$3.44	Koch	\$2.87	12.05%	\$0.86	3.61%
Moultrie Independent Tel. Co.	04-0189	\$4.74	Koch	\$3.67	12.66%	\$3.23	11.17%
New Windsor Tel. Co.	04-0195	\$3.17	Koch	\$1.97	8.23%	\$1.57	6.56%
Oneida Network Services, Inc.	04-0199	\$8.37	Koch	\$4.54	19.32%	\$4.46	18.98%
Oneida Tel. Exchange	04-0200	\$3.92	Koch	\$2.57	11.69%	\$1.61	7.34%
Reynolds Tel. Co.	04-0206	\$3.19	Hanson	\$2.18	9.94%	\$1.79	8.16%
Shawnee Tel. Co.	04-0236	\$3.02	Hanson	\$2.77	10.74%	\$0.76	2.95%
Viola Home Tel. Co.	04-0194	\$2.69	Koch	\$1.72	7.83%	\$1.30	5.91%
Woodhull Community Tel. Co.	04-0197	\$3.28	Koch	\$2.17	8.78%	\$1.38	5.57%
Yates City Tel. Co.	04-0240	\$2.88	Hanson	\$1.85	6.42%	\$1.67	5.80%

Flat Rock, at Paragraph 21 of its Motion to Strike, moves to strike the brief in its entirety because Verizon Wireless brief, at times examines the process of all 33 Petitions. The 33 filed Petitions were all filed virtually simultaneously, all on the same statutory 180-day schedule, and all seeking the same relief. All 33 cases were scheduled for hearing before the same Administrative Law Judge, during the same two weeks from June 7 through June 18. All sought the same interim relief orders and all were granted the same interim relief orders. Staff policy witness Hoagg filed 33 sets of substantially identical testimony supporting the same recommendation to grant Petitioners' requests. The 33 cases take on all of the characteristics of an assembly line, if for no other reason than attempting to fairly process 33 individual cases in the time frame allowed is virtually impossible. To meet this impossible task and rather than require the ALJ and the Commission to read 22 identical briefs, Verizon Wireless concentrated



on just a few dockets and filed a single consolidated brief for the remaining 17. Notably, Staff took a similar action in filing a single 2-page brief covering all 33 cases.

## II. VERIZON WIRELESS UTILIZED APPROPRIATE INFORMATION IN ITS BRIEF

In paragraph 2 of its Motion, Flat Rock argues that Verizon Wireless' Brief should be stricken in its entirety or, alternatively, that portions of Verizon Wireless' Brief should be stricken as "outside of the scope of the record." In support of this assertion, Flat Rock cites only to 220 ILCS 5/10-103 (Section 10-103 of the Public Utilities Act) and claims that "[f]indings, decision [*sic*] and orders made by the Commission must be based *exclusively on the record* in a given proceeding and the documents described in Section 10-35 of the Illinois Administrative Procedure Act, 5 ILCS 100/10-35." While Flat Rock is correct that, generally speaking, findings, decisions, and orders made by the Commission are to be based exclusively on "the record," Flat Rock fails to recognize the breadth of "the record" under the applicable rules, regulations, and policies.

The pertinent portion of Section 10-103 of the Public Utilities Act states as follows:

In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits **together with all papers and requests filed in the proceeding, including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative Procedure Act.**<sup>21</sup>

Section 10-35(a) of the Illinois Administrative Procedure Act provides that "the record" in a contested case includes all of the following:

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<sup>21</sup> 220 ILCS 5/10-103 (*emphasis added*).

- (1) All pleadings (including all notices and responses thereto), motions, and rulings.
- (2) All evidence received.
- (3) A statement of matters officially noticed.
- (4) Any offers of proof, objections, and rulings thereon.
- (5) Any proposed findings and exceptions.
- (6) Any decision, opinion, or report by the administrative law judge.
- (7) All staff memoranda or data submitted to the administrative law judge or members of the agency in connection with their consideration of the case that are consistent with Section 10-60 [5 ILCS 100/10-60].
- (8) Any communication prohibited by Section 10-60 [5 ILCS 100/10-60]. No such communication shall form the basis for any finding of fact.<sup>22</sup>

Notably, the Commission's own rules call for an even broader and more inclusive record.

Specifically, Section 200.700(a) of the Commission's Rules of Practice states as follows:

- a) The record in any proceeding before the Commission shall include:
  - 1) **All pleadings**, (including all notices and responses thereto), motions, and rulings;
  - 2) Evidence received;
  - 3) A statement of matters officially noticed;
  - 4) Offers of proof, objections, and rulings thereon;
  - 5) Proposed findings and exceptions;
  - 6) Any decision, opinion or report by the Hearing Examiner ...;

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<sup>22</sup> 5 ILCS 100/10-35(a).

- 7) All staff memoranda or data submitted to the Hearing Examiner or Commissioners in connection with their consideration of the case ...;
- 8) **Any briefs**, proposed orders and exceptions thereto which have been filed by the parties;
- 9) Orders and opinions of the Commission; and
- 10) Any communications prohibited by Section 200.710, but such communications shall not form the basis for any finding of fact. ...<sup>23</sup>

Therefore, pursuant to the applicable rules, regulations, and procedures, the brief that Flat Rock seeks to have stricken is a part of the record upon which any findings, decisions, or orders made by the Commission must be based. As such, Flat Rock's primary argument is unfounded and does not provide a legitimate basis for striking the brief of Verizon Wireless. Moreover, Flat Rock's argument fails to acknowledge and recognize the broad discretion possessed by the Commission in shaping and conducting proceedings before it.<sup>24</sup> In this case, public policy is best served and the policies and goals of the Commission are furthered by the use of this discretion to consider of all materials submitted to the Commission in this matter.<sup>25</sup> After a review of the entire record, including Verizon Wireless' Brief, the Commission can and should then base its decision on what it finds to be the most credible, convincing, and pertinent portions of the record as a whole.

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<sup>23</sup> 83 Ill. Admin. Code 200.700 (*emphasis added*).

<sup>24</sup> See *Antioch Milling Co. v. Public Service Co. of Northern Ill.*, 4 Ill.2d 200, 210; 123 N.E.2d 302 (1954); *People of Cook County v. Ill. Commerce Commission*, 237 Ill.App.3d 1022, 1030; 606 N.E.2d 79 (1992). Additionally, the Commission has unfettered discretion to consider late-filed exhibits for admission into evidence at any time prior to issuance of a final order. See, e.g., 83 Ill. Admin. Code 200.875(c).

<sup>25</sup> See *Petition of Commonwealth Edison Co.*, ICC Docket No. 01-0423, Opinion and Order, March 28, 2003 (noting that policy issues concerning goals and objectives can be and are considered by the Commission in reaching its decisions).

### III. NUMBER POOLING AND NXX EXHAUSTION ARE IMPORTANT TO THIS COMMISSION'S DETERMINATION.

In Paragraph 4 of its Motion to Strike, Flat Rock seeks to strike Verizon Wireless' discussion of the impact of a grant of a subsequent LNP waiver to Flat Rock on number pooling and area code ("NXX") exhaustion. This Commission has been on the forefront of number pooling for many years. Staff's witness, Mr. Hoagg, specifically recognized the importance of wireline-to-wireless LNP on continued number pooling efforts in his direct testimony:

- Q. As a general matter, is deployment of number portability capabilities by Illinois local exchange carriers desirable?
- A. Yes. Congress required all telecommunications carriers to provide number portability pursuant to rules promulgated by the FCC. The FCC has promulgated a number of such rules. It has stated, on at least one occasion, that the failure of telecommunications carriers to provide number portability "hampers the development of local competition." **The FCC has emphasized that carriers offering number portability also participate in number pooling to optimize numbering resources, which benefits consumers by staving off the creation of new area codes.**<sup>26</sup>

Unfortunately, Mr. Hoagg made no other mention of number pooling in his direct testimony and did not reflect this public benefit in his analysis or conclusions regarding the length of the requested suspension. However Mr. Hoagg was cross-examined on the topic.<sup>27</sup>

Flat Rock makes no reference to nor acknowledge the importance of this issue in its direct or rebuttal testimony.<sup>28</sup>

Verizon Wireless provided important factual information relevant to Mr. Hoagg's response that the impact of LNP on number pooling be carefully considered. The information

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<sup>26</sup> Staff Exhibit 1.0, p. 5 (emphasis added).

<sup>27</sup> TR 239-243.

<sup>28</sup> Flat Rock Exhibits 1 and 2.

provided is in the public record<sup>29</sup> and likely in the Commission's own records and files. Due to the importance of this information in enabling the Administrative Law Judge and the Commission to make a fair and reasoned decision that is consistent with the public interest, if deemed necessary by the Administrative Law Judge or the Commission, Verizon Wireless hereby requests that the record be re-opened and that Administrative Notice be taken of the information provided by Verizon Wireless, which Flat Rock seeks to strike. Administrative Notice is appropriate under Section 200.640 of the Commission's Rules, as a compilation of various reports provided to this Commission on a regular basis and as "generally recognized [ ] technical facts within the specialized knowledge of the Commission."<sup>30</sup> Section 200.640(C) of the Commission's rules provide that

Parties and Staff shall be notified either before or during the hearing **or otherwise** of the materials noticed and shall be provided a reasonable opportunity to contest the material so noticed.<sup>31</sup>

Verizon Wireless' Brief provides sufficient notice to all parties of such materials. As evidenced by the instant Motion to Strike, Flat Rock has had an opportunity to contest such

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<sup>29</sup> See, NeuStar, Inc. North American Numbering Plan Administration, *NPA Relief Activity Status Report*, (updated as of June 1, 2004) <<http://www.nanpa.com/reports/report.pdf>>. Verizon Wireless Brief pp. 19-20.

<sup>30</sup> See e.g., *NeuStar, Inc. in its role as North American Numbering Plan Administrator Petition for Approval of Numbering Plan Area Relief Planning for the 815 Area Code*, ICC Docket No. 00-0475, Order, Feb. 4, 2004; *Investigation into the Requirement for a Single Overlay for the 312 and 773 NPAs*, ICC Docket No. 02-0093; Opinion, Feb. 4, 2004; *Petition to Implement Telephone Number Conservation and Number Pooling in the 309 and 217 Area Codes*, ICC Docket No. 00-0681, Opinion, Mar. 5, 2002; *NANPA, on behalf of the Illinois Telecommunications Industry, Petition for Approval of Numbering Plan Area Relief Planning for 618 Area Code*, ICC Docket No. 00-0677, Interim Order, Oct 2, 2001; *Petition for approval of NPA Relief Plans for the 312, 630, 708, and 773 NPAs*, ICC Docket No. 98-0847, Order, Aug. 21, 2001.

<sup>31</sup> 83 Ill. Admin. Code, Section 200.640(c).

materials. Because of the importance and relevance of number pooling and NXX exhaustion to Flat Rock's requested additional delay in the implementation of LNP, such materials should be allowed to remain in the record and considered by this Commission.

#### **IV. FLAT ROCK'S REQUEST TO STRIKE ARGUMENTS AND REASONED CONCLUSIONS IN VERIZON WIRELESS' BRIEF SHOULD BE DENIED**

In Paragraphs 7, 8, 9, 11, 12, 15, and 21 of its Motion to Strike, Flat Rock seeks to strike argument and reasoned conclusions from Verizon Wireless' Brief. Verizon Wireless stands by the following advocacy statements in its brief, which are arguments and conclusions that build upon facts in the record, rather than mere statements of fact. The ALJ is free to determine the appropriate weight to give each of these conclusions:

- “Moreover demand will follow the wide availability of the service and carriers attempts to woo customers and compete in the marketplace with advertisements and targeted mailings.”<sup>32</sup>
- “As customers learn about the opportunities to port their landline numbers demand for LNP will grow even more, spurring additional competition and the related public interest benefits.”<sup>33</sup>
- “Petitioners could not identify exactly what would be included in these mailings and called such identification premature.”<sup>34</sup>
- “Not only are each of these line items, not “carrier-specific costs *directly related* to providing LNP, as required by the FCC, but they are not specific to Petitioners and are significantly overstated.”<sup>35</sup>

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<sup>32</sup> Verizon Wireless Brief, p. 25; *See*, Flat Rock Motion to Strike, ¶ 7.

<sup>33</sup> Verizon Wireless Brief, p. 27; *See*, Flat Rock Motion to Strike, ¶ 8.

<sup>34</sup> Verizon Wireless Brief, p. 32; *See*, Flat Rock Motion to Strike, ¶ 12. *See also*, Flat Rock Exhibit 1, pp 30-31.

- “Many of these costs are not *directly related to providing LNP*, and the FCC would likely reject the inclusion of such in an LNP surcharge.”<sup>36</sup>
- “Petitioners took no steps to minimize the impact of its estimated LNP Surcharge Proposal, but in fact inflated the numbers to attempt to portray a worst case scenario and create ‘a significant adverse impact on users of telecommunications services generally.’”<sup>37</sup>
- An examination of Flat Rock’s Petition vis-à-vis the other 33 petitions as they relate to the Federal Communications Commission’s standards for such waivers from LNP requirements.<sup>38</sup>

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<sup>35</sup> Verizon Wireless Brief, p. 31; *See*, Flat Rock Motion to Strike, ¶ 11. Verizon Wireless included a footnote with this conclusion relying on 47 C.F.R. § 52.33 (emphasis added) and *In the Matter of Telephone Number Portability*, CC Docket No. 95-116, FCC 02-116, 17 FCC Rcd 2578; 2002, Feb 16, 2002, ¶41. Additional FCC orders that support this assertion are, *Citizens Telecommunications Companies; Petition for Waiver of Section 52.33(a)(1)(iv) of the Commission’s Rules to Reduce Recovery Period of Local Number Portability Surcharge*, Order, 19 FCC Rcd 8128 (April 30, 2004); *Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver*, CC Docket No. 95-116, Order, 19 FCC Rcd 6800 (April 8, 2004); *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd 2578 (January 23, 2002); *Long-Term Number Portability Tariff Filings; U S WEST Communications, Inc.*, CC Docket No. 99-35; Transmittal Nos 965, 975, 1002, Memorandum Opinion and Order, 14 FCC Rcd 11983 (July 9, 1999); *Long-Term Number Portability Tariff Filings; Ameritech Operating Companies, et al.*, CC Docket No. 99-35, Memorandum Opinion and Order, 14 FCC Rcd 11883 (July 1, 1999); *Telephone Number Portability Cost Classification Proceeding*, CC Docket No. 95-116; RM 8535, Memorandum Opinion and Order, 13 FCC Rcd 24495 (December 14, 1998); *Telephone Number Portability*, CC Docket No. 95-116; RM 8535, Third Report and Order, 13 FCC Rcd 11701 (May 5, 1998)

<sup>36</sup> Verizon Wireless Brief, pp. 31-32; *See*, Flat Rock Motion to Strike, ¶ 11. *See supra* n. 35 for support for this assertion.

<sup>37</sup> Verizon Wireless Brief, p. 37; *See*, Flat Rock Motion to Strike, ¶ 16. The support for this statement is contained in the context in which it is offered in the brief, in addition, Flat Rock admits in its direct testimony that “we have had no choice but to assume the worst case scenario.” Flat Rock Exhibit 1, pp 18-19.

<sup>38</sup> Verizon Wireless Brief, pp. 45-47, *See*, Flat Rock Motion to Strike, ¶ 21. Also see Verizon Wireless’ discussion in this Response to Flat Rock’s Motion, Sections I.B and I.C, *supra*.

**V. THIS COMMISSION MUST COMPARE FLAT ROCK TO OTHER CARRIERS' OFFERING LNP.**

As noted above, to make an informed decision regarding whether or not an additional suspension of Flat Rock's obligation to provide LNP "is necessary to avoid significant adverse impact on users of telecommunications services generally,"<sup>39</sup> Flat Rock had a burden to demonstrate to this Commission that any impact on its customers would be "significantly adverse." This Commission cannot make such a determination without examining the actual impact of LNP on other carriers' customers. Though Flat Rock had the burden to provide such information to the Commission, it was Verizon Wireless who examined countless public FCC Access Tariffs to find the few Illinois companies who have tariffed LNP surcharges. This information should be vital to this Commission's determination, yet at Paragraph 10 of its Motion to Strike, Flat Rock attempts to strike this information, the majority of which comes from Staff Exhibit 1.0, p 8, and an FCC Order.

Due to the importance of this information in enabling the Administrative Law Judge and the Commission to make a fair and reasoned decision that is consistent with the public interest, if deemed necessary by the Administrative Law Judge or the Commission, Verizon Wireless hereby requests that the record be re-opened and that Administrative Notice be taken of the information provided by Verizon Wireless, which Flat Rock seeks to strike. Administrative Notice is appropriate under Section 200.640(a)(3) of the Commission's Rules, as "[a]nnual reports, tariffs, classifications and schedules regularly established by or filed with the

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<sup>39</sup> 47 U.S.C. § 251(f)(2)(i).



Commission as required or authorized by law or by an order or rule of the Commission.”<sup>40</sup>

Section 200.640(c) of the Commission’s rules provide:

Parties and Staff shall be notified either before or during the hearing **or otherwise** of the materials noticed and shall be provided a reasonable opportunity to contest the material so noticed.<sup>41</sup>

Verizon Wireless’ Brief provides sufficient notice to all parties of such materials. As evidenced by the instant Motion to Strike, Flat Rock has had an opportunity to contest such materials. Because of the importance and relevance of a comparison of LNP costs to customers on whether or not Flat Rock’s requested additional delay in the implementation of LNP will have an adverse impact on users of telecommunications services generally, such materials should be allowed to remain in the record and considered by this Commission.

## **VI. VERIZON WIRELESS’ DISCUSSION OF FLAT ROCK’S PROPOSED LNP SURCHARGE IS APPROPRIATE**

Despite the fact that Flat Rock’s entire case revolves around its proposed LNP surcharge, Flat Rock attempts to strike Verizon Wireless discussion of Flat Rock’s cost study, because it claims that it is “not before this Commission.”<sup>42</sup> As Flat Rock’s witness testified:

As shown at the bottom right-hand corner of that page of the Attachment, Flat Rock would have to recover \$3.37 per month from each access line either by means of a surcharge or a rate increase to recover the costs as described. It is Flat Rock’s position

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<sup>40</sup> 83 Ill. Admin. Code, Section 200.640(a)(3); *See e.g.*, Staff Exhibit 1.0, p 8; *In the Matter of Citizens Telecommunications Companies*, FCC DA 04-1252, 19 FCC Rcd 8128, Apr 30, 2004; Geneseo Telephone Company filed the 3<sup>rd</sup> Revision to Page 39 of its FCC Tariff 1 on June 16, 2004 implementing this rate. (FCC Transmittal 8). On June 17, 2004, Geneseo sought leave to withdraw Transmittal No. 8, “in order to spend more time evaluating the service wit the FCC before refilling it in the tariff.” *Geneseo FCC Tariff No 1, Application No. 2*, June 17, 2004.

<sup>41</sup> 83 Ill. Admin. Code, Section 200.640(c) (emphasis added).

<sup>42</sup> Flat Rock Motion to Strike, ¶ 14; Flat Rock’s Cost Study is included with its Testimony as Exhibit 1, Attachment 1.

that the Commission should find that a further suspension or modification of any obligation Flat Rock may have to provide wireline-to-wireless local number portability is necessary to avoid a significant adverse economic impact on Flat Rock's customers or to avoid imposing a requirement that is unduly economically burdensome on Flat Rock and that the granting of such further suspension is consistent with the public interest, convenience and necessity.<sup>43</sup>

In addition, Flat Rock's entire Attachment 1 to its Exhibit 1 consists of a model for a proposed LNP surcharge, which Flat Rock's witness admits

is based on cost support filed and approved by the National Exchange Carriers Association (NECA) in a local number portability filing, which they made with the FCC in NECA's Transmittal #956. The NECA model has been used by individual companies to file their federal surcharges, and as a result, we felt it was appropriate for use.<sup>44</sup>

Further, Staff's Cost Witness, Mr. Koch's, testimony,<sup>45</sup> almost entirely consists of an analysis of these costs and whether or not they are appropriate or inflated. Flat Rock did not move to strike Mr. Koch's testimony, but now moves to strike Verizon Wireless' analysis which is based on Mr. Koch's testimony. It is disingenuous for Flat Rock to now state "whether a cost would be includable or excludable from the FCC surcharge is irrelevant to this docket."<sup>46</sup> If Flat Rock's costs of implementing LNP, and the impact those costs will have on Flat Rock's customers, are irrelevant, then that alone is reason for the Commission to dismiss Flat Rock's Petition, as there is obviously no "significant adverse impact on users of telecommunications services generally."<sup>47</sup>

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<sup>43</sup> Flat Rock Exhibit 1, pp. 23-24.

<sup>44</sup> *Id.* at 21-22.

<sup>45</sup> Staff Exhibit 3.0.

<sup>46</sup> Flat Rock Motion to Strike, ¶ 13.

<sup>47</sup> 47 U.S.C. § 251(f)(2)(i).

Further, after criticizing Verizon Wireless for relying on argument and reasoned conclusions throughout its brief, Flat Rock now claims, for the first time in this proceeding that Flat Rock is a “rate-of-return company.” If this was of importance to how Flat Rock recovers its costs, it should have been raised by Flat Rock’s witness, not for the first time in a Motion to Strike Verizon Wireless’ Brief.

## **VII. THERE IS NO NEED TO DISTINGUISH BETWEEN STAFF WITNESSES WHEN THEIR TESTIMONIES ARE VIRTUALLY IDENTICAL**

In Paragraph 16 of its Motion to Strike, Flat Rock complains that Verizon Wireless fails to distinguish between Mr. Hanson and Mr. Koch, Staff’s two cost witnesses. However, Staff’s cost witness, Robert F. Koch, presents virtually identical testimony in this docket to that which he presented in the other dockets in which he testified; only the company name, docket number, and specific cost data is different.<sup>48</sup> And, a side-by-side comparison of Staff’s other cost witness, Mark A. Hanson’s testimony, demonstrates that it is almost indistinguishable from Mr. Koch’s

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<sup>48</sup> Staff Exhibit 3.0., Mr. Koch testified in Gridley Telephone Company (Docket No. 04-0180), Flat Rock Telephone Co-Op, Inc., (Docket No 04-0181), Cambridge Telephone Company, (Docket No 04-0182), Henry County Telephone Company, (Docket No 04-0183), LaHarpe Telephone Company, (Docket No 04-0184), Hamilton County Telephone Co-Op, (Docket No 04-0185), McDonough Telephone Company, (Docket No 04-0186), Moultrie Independent Telephone Company, (Docket No 04-0189), Diverse Communications, (Docket No 04-0192), Glasford Telephone Company, (Docket No 04-0193), Viola Home Telephone Company, (Docket No 04-0194), New Windsor Telephone Company, (Docket No 04-0195), Montrose Mutual Telephone Company, (Docket No 04-0196), Woodhull Community Telephone Company, (Docket No 04-0197), Leaf River Telephone Company, (Docket No 04-0198), and Oneida Network Services, Inc., (Docket No 04-0199).

testimony on the same subject.<sup>49</sup> The only difference between their testimonies is their individual qualifications and docket specific cost information.

Examining Verizon Wireless' Initial Brief, and comparing Mr. Koch's testimony in the instant docket, Flat Rock (Docket No. 04-0181) to Mr. Hanson's testimony in another docket, Reynolds Telephone Company (Docket No. 04-0206) demonstrates this point:

<b>Verizon Wireless Brief</b>	<b>Flat Rock (Docket No. 04-0181) Robert F. Koch</b>		<b>Reynolds (Docket No. 04-0206) Mark A. Hanson</b>	
<b>Citation</b>	<b>Citation</b>	<b>Text</b>	<b>Citation</b>	<b>Text</b>
p. 38, n. 89.	Staff Exh. 3.0.	Mr. Koch's Direct Testimony	Staff Exh. 3.0.	Mr. Hanson's Direct Testimony
	Staff Exh. 3.0, Schedule 3.1	Scenario 1	Staff Exh. 3.0, Schedule 3.1	Scenario 1
	Staff Exh. 3.0, Schedule 3.2	Scenario 2	Staff Exh. 3.0, Schedule 3.2	Scenario 2
p. 39, n. 90.	Staff Exh. 3.0, p. 6.	Commission has had no role in determining the appropriate rates for LNP cost recovery to date	Staff Exh. 3.0, p. 4.	Commission has had no role in determining the appropriate rates for LNP cost recovery to date
p. 39, n 91.	Staff Exh. 3.0, p. 9.	Q. Did the Wireline to Wireless LNP Order address cost recovery? A. To the best of my understanding, the Wireline to Wireless LNP Order does not address any cost recovery issues directly. The order does acknowledge that there are outstanding issues regarding the recovery of costs associated with routing calls between	Staff Exh. 3.0, p. 6.	Q. Did the Wireline to Wireless LNP Order address cost recovery? A. To the best of my understanding, the Wireline to Wireless LNP Order does not address any cost recovery issues directly. The order does acknowledge that there are outstanding issues regarding the recovery of costs associated with routing calls between

<sup>49</sup> Mr. Hanson testified in Oneida Telephone Exchange, (Docket No 04-0200), McNabb Telephone Company, (Docket No 04-0205), Reynolds Telephone Company, (Docket No 04-0206), Adams Telephone Co-Op, (Docket No 04-0228), Cass Telephone Co, (Docket No 04-0232), Shawnee Telephone Company, (Docket No 04-0236), C-R Telephone Company, (Docket No 04-0237), The El Paso Telephone Company, (Docket No 04-0238), Odin Telephone Exchange, Inc., (Docket No 04-0239), Yates City Telephone Company, (Docket No 04-0240), Kinsman Telephone Company, (Docket No 04-0243), Stelle Telephone Company, (Docket No 04-0248), Mid Century Telephone Co-Op, (Docket No 04-0249), Wabash Telephone Co-Op, (Docket No 04-0253), Leonore Mutual Telephone Company, (Docket No 04-0259), Grandview Mutual Telephone Company, (Docket No 04-0282), and Crossville Telephone Co, (Docket No 04-0283).

<b>Verizon Wireless Brief</b>	<b>Flat Rock (Docket No. 04-0181) Robert F. Koch</b>		<b>Reynolds (Docket No. 04-0206) Mark A. Hanson</b>	
<b>Citation</b>	<b>Citation</b>	<b>Text</b>	<b>Citation</b>	<b>Text</b>
		<p>wireline and wireless carriers, but concludes that these issues are outside the scope of the proceeding. Further, the order indicates that calls to ported numbers will not be rated differently than calls to non-porting numbers. As such, it can be inferred that the order prohibits the wireline carrier from recovering the incremental cost of routing calls to numbers ported to wireless carriers from its own customers via minute of use charges.</p> <p>Q. Did the Wireline to Wireless LNP Order address the issue of the economic burden on either end-user customers or porting carriers?</p> <p>A. To my knowledge, the order does not address any economic burden issues.</p>		<p>wireline and wireless carriers, but concludes that these issues are outside the scope of the proceeding. Further, the order indicates that calls to ported numbers will not be rated differently than calls to non-porting numbers. As such, it can be inferred that the order prohibits the wireline carrier from recovering the incremental cost of routing calls to numbers ported to wireless carriers from its own customers via minute of use charges.</p> <p>Q. Did the Wireline to Wireless LNP Order address the issue of the economic burden on either end-user customers or porting carriers?</p> <p>A. To my knowledge, the order does not address any economic burden issues.</p>
pp. 39-40, n 92.	Staff Exh. 3.0, p. 12	<p>Since this is such a recent requirement mandated by the FCC, there isn't much information available upon which to develop a forecast of how many customers may desire to use this service. Anecdotal evidence suggests that, at this point, demand has been rather low. However, since the service is so new, that may change. Also, usage estimates are based on an average customer, perhaps the type of customer who would use this service may differ from the "average" LEC customer. At this point, there is insufficient evidence to say.</p>	Staff Exh. 3.0, p. 9.	<p>Since this is such a recent requirement mandated by the FCC, there isn't much information available upon which to develop a forecast of how many customers may desire to use this service. Anecdotal evidence suggests that, at this point, demand has been rather low. However, since the service is so new, that may change. Also, usage estimates are based on an average customer, perhaps the type of customer who would use this service may differ from the "average" LEC customer. At this point, there is insufficient evidence to say.</p>
p. 40, n. 95	Staff Exh 3.0, p 15	<p>Putting aside the issue of whether such costs are most appropriately recovered by the customer, I cautiously</p>	Staff Exh 3.0, p 11.	<p>Putting aside the issue of whether such costs are most appropriately recovered by the customer, I cautiously</p>

<b>Verizon Wireless Brief</b>	<b>Flat Rock (Docket No. 04-0181) Robert F. Koch</b>		<b>Reynolds (Docket No. 04-0206) Mark A. Hanson</b>	
<b>Citation</b>	<b>Citation</b>	<b>Text</b>	<b>Citation</b>	<b>Text</b>
		accepted the estimates provided by the company in my Scenario 1 calculations.		accepted the estimates provided by the company in my Scenario 1 calculations.
p. 41, n 97	Staff Exh 3.0, p 11	there is uncertainty with respect to who is ultimately responsible for transport and transiting costs associated with porting numbers from the LECs to wireless carriers.	Staff Exh 3.0, p 8.	there is uncertainty with respect to who is ultimately responsible for transport and transiting costs associated with porting numbers from the LECs to wireless carriers.
p. 41, n. 98.	Staff Exh 3.0, p 11.	the FCC's order mandating LNP to wireless carriers determined that issue was outside the scope of that proceeding.	Staff Exh 3.0, p 8.	the FCC's order mandating LNP to wireless carriers determined that issue was outside the scope of that proceeding.
p. 41, n. 99.	Staff Exh 3.0, p 12.	the levels of transport and transit costs are very sensitive to the assumptions about the number of customers who elect to port their number to a wireless carrier and the amount of usage of those customers.	Staff Exh 3.0, p 9.	the levels of transport and transit costs are very sensitive to the assumptions about the number of customers who elect to port their number to a wireless carrier and the amount of usage of those customers.
P 41, n. 100.	Staff Exh 3.0, pp 15-16.	I have a concern about the calculation of transport and transit costs for two reasons. First, it remains unclear whether the minutes for some local calls were counted twice--once as an originating minute, and once as a terminating minute. Second, it remains unclear as to how extended area service ("EAS") calls were treated in the calculation. EAS routes are unique between carriers, and as such, whether they should be included in the local minutes of use for the purpose of calculating transport and transit costs is not a trivial matter. I am not convinced at this point in time that the costs associated with transporting EAS calls for ported customers will continue to be the responsibility of the wireline carrier.	Staff Exh 3.0, p 11.	I have a concern about the calculation of transport and transit costs for two reasons. First, it remains unclear whether the minutes for some local calls were counted twice--once as an originating minute, and once as a terminating minute. Second, it remains unclear as to how extended area service ("EAS") calls were treated in the calculation. EAS routes are unique between carriers, and as such, whether they should be included in the local minutes of use for the purpose of calculating transport and transit costs is not a trivial matter. I am not convinced at this point in time that the costs associated with transporting EAS calls for ported customers will continue to be the responsibility of the wireline carrier.
p. 42, n 102.	Staff Exh 3.0,	I present Scenario 2 as well	Staff Exh 3.0,	I present Scenario 2 as well

<b>Verizon Wireless Brief</b>	<b>Flat Rock (Docket No. 04-0181) Robert F. Koch</b>		<b>Reynolds (Docket No. 04-0206) Mark A. Hanson</b>	
<b>Citation</b>	<b>Citation</b>	<b>Text</b>	<b>Citation</b>	<b>Text</b>
	p 13.	so the Commission can assess potential adverse economic impacts to Flat Rock and its customers absent the transport and transiting costs.	p 9-10	so the Commission can assess potential adverse economic impacts to Reynolds and its customers absent the transport and transiting costs.

As demonstrated by the table above, the citations to Mr. Koch’s testimony in this docket are indistinguishable from Mr. Hanson’s testimony in Docket No. 04-0206. Though Verizon Wireless should have referred to “the witness” as opposed to referring to Mr. Hanson or Mr. Koch by name, because their testimonies are identical, Verizon Wireless’ citation to either testimony is relevant and appropriate to Flat Rock. It should not be stricken.

#### **VIII. VERIZON WIRELESS PROPERLY INTERPRETED MR. HOAGG’S TESTIMONY**

In Paragraph 19 of its Motion to Strike, Flat Rock accuses Verizon Wireless of an “attempt to impose upon all dockets” its interpretation of Staff’s Policy Witness Jeffrey H. Hoagg’s testimony. Interpreting a witnesses’ testimony is not inappropriate for a brief. While Verizon Wireless did not cite to specific examples in Mr. Hoagg’s testimony for its analysis on pages 42 through 43 of its brief, such an oversight can be easily cured. The section of Verizon Wireless’ Brief in question is reproduced below with citations to Mr. Hoagg’s Direct Testimony:

Staff policy witness Hoagg testified that he believed that whether to grant waivers of LNP obligations requires the application of judgment on a case specific basis.<sup>50</sup> However, Staff witness Hoagg made the same recommendation to suspend the obligations in all the cases.<sup>51</sup>

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<sup>50</sup> Staff Exhibit 1.0, p 9.

<sup>51</sup> A simple side-by-side examination of Mr. Hoagg’s testimony in Flat Rock to his testimony in any of the other 32 cases easily demonstrates that they are virtually identical, including their recommendation.

Staff witness Hoagg acknowledges that any deployment of LNP would have some level of tangible benefits associated with it.<sup>52</sup>

He has examined the so-called “take rate” or consumer demand for wireline to wireless LNP over a period from November 24, 2003 until the end of January 2004, a period of a little more than two months, in order to conclude that consumer demand was comparatively low.<sup>53</sup>

Staff witness Hoag also acknowledges that he would not expect a wireless carrier to be able to establish a market or increase the take rate in an area where they are not allowed to offer local number portability. Consequently, he would expect that the take rate would remain at zero in such an area. Although Mr. Hoagg does not expect the take rates in Petitioners’ area to rise above zero if the Commission grants the requested waiver,<sup>54</sup> he does expect that over the intervening two years that there will be a significant enough number of 2% carriers around the country that will have been providing LNP that we will have a good database to work with.<sup>55</sup> Unfortunately, if Staff’s recommendation is adopted, there will be very little such experience in the State of Illinois.

As to costs, Staff policy witness Hoagg admits that comparing the cents per line per month charge for small rural carriers to the LNP surcharge of \$.28 for SBC Illinois is apples to oranges.<sup>56</sup> He indicated that he had examined some companies who are getting down to a potential surcharge close to that of SBC Illinois’ \$.28, and he identifies those companies as Odin, El Paso perhaps, McDonough.<sup>57</sup>

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<sup>52</sup> Staff Exhibit 1.0, pp. 10-11

<sup>53</sup> Verizon Wireless draws this conclusion based on Mr. Hoagg’s testimony at, Staff Exhibit 1.0, pp. 11-12.

<sup>54</sup> Though Verizon Wireless does base these conclusions on cross-examination of Mr. Hoagg in other dockets, notably Odin Telephone Company, Docket No. 04-0239, TR 318. However, it cannot be refuted that if the instant additional suspension in Flat Rock’s service area is granted, there will remain a take-rate of zero until LNP is available.

<sup>55</sup> Staff Exhibit 1.0, p. 19.

<sup>56</sup> Staff Exhibit 1.0, p. 9.

<sup>57</sup> Verizon Wireless does base these conclusions on cross-examination of Mr. Hoagg in other dockets, notably Odin Telephone Company, Docket No. 04-0239, TR 312.



As to the issue of transport and transiting costs, Staff witness Hoagg clearly understood that the FCC had rejected delaying deadlines for LNP compliance just like what was requested by Petitioners here.<sup>58</sup> Further, Mr. Hoagg acknowledges that this is the same claim that is one of the bases for Petitioners' request here of the Commission.<sup>59</sup>

While Verizon Wireless can, and above does, rely on Mr. Hoagg's Direct Testimony to support its conclusions regarding the testimony, Verizon Wireless maintains that where a witness delivering the **same exact testimony** in multiple dockets is subject to multiple cross-examination, that witness's cross-examination testimony should be available in any docket in which the witness chose to offer the identical testimony. Failure to allow this would allow the witness to change or supplement his responses from docket to docket resulting in a violation of the cross-examining party's due process rights.

**IX. VERIZON WIRELESS DID NOT ENGAGE IN IMPROPER IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT.**

In Paragraph 19 of its Motion to Strike, Flat Rock characterizes Verizon Wireless' discussion of the testimony of Staff witness Hoagg as an improper attempt at impeachment by prior inconsistent statement and argues that Verizon Wireless failed to lay the proper foundation. In support of this argument, Flat Rock cites to several judicial decisions and asserts that "[b]efore proof of an inconsistent statement for impeachment can be admitted, a proper foundation must be laid during cross examination." Contrary to Flat Rock's characterization, however, Verizon Wireless' discussion of the testimony of Staff witness Hoagg is not an improper attempt at impeachment by prior inconsistent statement.

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<sup>58</sup> Staff Exhibit 1.0, pp 16-17.

<sup>59</sup> Staff Exhibit 1.0, p. 19.

First, impeachment by prior inconsistent statement involves the introduction of proof that a witness made a statement prior to *and* outside the context of the testimony at issue that contradicts the testimony at issue.<sup>60</sup> Here, the alleged “prior inconsistent statement” occurred during Mr. Hoagg’s testimony in proceedings before the Commission including the direct testimony Mr. Hoagg offered in this docket. If Mr. Hoagg’s testimony on cross-examination in the other dockets regarding the exact same subject matter contradicts his testimony on direct examination in this docket (which, as indicated herein, is virtually the same testimony), any damage to his credibility did not result from the introduction of a prior inconsistent statement but rather from the deficiencies of his testimony and from effective cross examination. Because the statements at issue were a part of Staff witness Hoagg’s testimony, they are simply not prior inconsistent statements for purposes of the rules of evidence.

Second, even if the summary of Mr. Hoagg’s testimony amounts to impeachment by prior inconsistent statement, the foundation rule is not applicable. The general rule is that before a prior inconsistent statement can be offered for impeachment purposes, a foundation must be laid when the witness whose credibility is challenged is cross-examined.<sup>61</sup> As the cases cited and relied upon by Flat Rock recognize and explain, the purpose of this rule is to protect the witness from unfair surprise and assure him the opportunity to deny or to explain the prior statement, primarily because the “prior” statement was made in a different context, to a different audience, and under different circumstances.<sup>62</sup> Given the uniformity of the cases, and virtually identical testimony presented by the witnesses in each docket, there was no surprise. In the case at bar, at

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<sup>60</sup> See Ill. Evid. Hand. Sec. 613.1.

<sup>61</sup> See *People v. Powell*, 53 Ill.2d 465, 473; 292 N.E.2d 409 (1973).

<sup>62</sup> *Id.*

the very least, and as in *Powell*<sup>63</sup> and *In the Interest of A.M. v. Filemon M.*,<sup>64</sup> both cited by Flat Rock, the foundation rule has been fulfilled because the witness was afforded the opportunity to explain any differences in his testimony while testifying. In short, Flat Rock argues that a foundation must be laid during cross examination, but ignores the fact that the statements themselves were elicited during cross examination of the witness before this Commission

For the foregoing reasons, Flat Rock's arguments concerning the lack of foundation for impeachment by prior inconsistent statement are wholly misplaced and inapplicable. The discussion of Staff witness Hoagg's testimony is just that – a discussion of his testimony – and is not a prior inconsistent statement offered for impeachment purposes.

## **X. GENERIC PROPOSED ORDER**

In Paragraph 22, of its Motion to Strike, Flat Rock attempts to strike Verizon Wireless' Proposed Order on the grounds that it allegedly "reflects no facts specific to Flat Rock."<sup>65</sup> Verizon Wireless modeled its proposed order on those used in the first five LNP waiver cases to be considered by this Commission.<sup>66</sup>

Flat Rock's witness provided virtually identical testimony to all of the other 32 dockets. A simple side-by-side examination of Mr. Hoagg's testimony in the 33 dockets easily demonstrates that they are virtually identical and that even Staff's cost witnesses, presented virtually identical testimony in all 33 dockets. The only substantive differences between each of

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<sup>63</sup> *Id.*

<sup>64</sup> 274 Ill.App.3d; 653 N.E.2d 1294 (1995).

<sup>65</sup> Flat Rock Motion to Strike, ¶ 22.

<sup>66</sup> Madison Telephone Company, Docket No. 03-0730; Egyptian Telephone Cooperative Association, Docket No. 03-0726; Harrisonville Telephone Compnay, Docket No. 03-0731, Alhambra-Grantfork Telephone Company, Docket No. 03-0732; and Home Telephone Company, Docket No. 03-0733.

the 33 Petitioners was the cost information. Verizon Wireless provided this Commission with a “fill-in-the-blank” draft order that addresses all of the points raised in this docket and into which Flat Rock specific cost information could be inserted.

However, to obviate Flat Rock’s concern that the ALJ might inappropriately apply the wrong figures to such a form proposed order,<sup>67</sup> Verizon Wireless has attached as Attachment A to its Response to Flat Rock’s Motion to Strike a completed Proposed Order for Flat Rock. This completed proposed order only differs from the one previously submitted only in that it has been completed for Flat Rock, for purposes of comparison, those “fields” that have been completed remain underlined.

#### **XI. VERIZON WIRELESS VOLUNTARILY WITHDRAWS CERTAIN SPECIFIC REFERENCES IN ITS BRIEF**

As discussed above, Verizon Wireless believes that all of the Petitions covered in its single consolidated brief were, for all intents and purposes, a common Petition, with essentially identical testimony. Therefore, cross examination of the same witness of the same testimony, albeit in the name of a separate company, is probative in the Commission’s effort to determine whether or not the lengthy (identical) suspension period requested by each Petitioner is justified. Further, Verizon Wireless believes that the following portions of its brief should not be stricken. However, given the short time period allowed for this response, and the fact that Petitioners bear the burden to prove all of which Verizon Wireless sought to disprove in its brief, Verizon Wireless, is voluntarily withdrawing the following portions of its generic brief:

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<sup>67</sup> Flat Rock Motion to Strike, ¶ 22. Verizon Wireless has more confidence in the ALJ’s ability.

- The statement that “Mr. Hoagg did not even know in which NPA many of Petitioners who have pending waiver petitions operate.”<sup>68</sup>
- References to certain other carriers that are required to be LNP capable in Illinois.<sup>69</sup>
- References to Verizon Wireless’ offered Attachment D.<sup>70</sup>
- Reference to and quotes from the ex-parte communication between Staff and the FCC’s Senior Economist for the Pricing Policy Division, Christopher Barnekov.<sup>71</sup> However, Verizon Wireless believes that the points made by Mr. Barnekov are fully outlined in various FCC Orders on LNP Cost Recovery.<sup>72</sup> And,

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<sup>68</sup> Verizon Wireless Brief, p 19, along with associated footnote. This is in response to Paragraph 3 of Flat Rock’s Motion to Strike.

<sup>69</sup> Verizon Wireless withdraws the following text and associated footnote, appearing on pages 23 through 24 of its Brief “Bergen Telephone Company, Chandlerville Telephone Company, Citizens Telephone Company, Clarksville Mutual Telephone Company, Frontier Communications, Inc., Gallatin River Telephone Company, Geneseo Telephone Company, Illinois Consolidated Telephone Company, Randview Mutual Telephone Company, and Sharon Telephone Company.” This is in response to Paragraph 6 of Flat Rock’s Motion to Strike.

<sup>70</sup> Verizon Wireless withdraws the text and associated footnote, appearing on page 27 of its Brief, beginning “Verizon Wireless attempted to provide the only factual evidence . . .” through “. . . wireless handsets” in response to Paragraph 8 of Flat Rock’s Motion to Strike.

Verizon Wireless notes for the record that by referring to Attachment D, it in no way indented to be disrespectful of the Administrative Law Judge’s ruling, as implied by Flat Rock. In the context in which it was used in Verizon Wireless’ Brief, it was not relied on as evidence, but cited to note that “Verizon Wireless attempted to provide” this information to the Commission.

<sup>71</sup> Verizon Wireless withdraws the text, and associated footnotes, beginning with the words “In response to a request for guidance from this Commission’s Staff . . .” on page 30 of its Brief through the text ending “. . . Do they plan to send tutors door-to-door?” on page 31 of its Brief. This is in response to Paragraph 10 of Flat Rock’s Motion to Strike.

<sup>72</sup> See, *Citizens Telecommunications Companies; Petition for Waiver of Section 52.33(a)(1)(iv) of the Commission’s Rules to Reduce Recovery Period of Local Number Portability Surcharge*, Order, 19 FCC Rcd 8128 (Apr. 30, 2004); *Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver*, CC Docket No. 95-116, Order, 19 FCC Rcd 6800 (Apr. 8, 2004); *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd 2578 (Jan. 23, 2002); *Long-Term Number Portability Tariff Filings; U S WEST Communications, Inc.*, CC Docket No. 99-35; Transmittal Nos 965, 975, 1002, Memorandum Opinion and Order, 14 FCC Rcd 11983 (July 9, 1999); *Long-Term Number Portability Tariff Filings; Ameritech Operating Companies, et al.*, CC Docket No. 99-35, Memorandum Opinion and Order, 14 FCC Rcd 11883 (July 1, 1999); *Telephone Number Portability Cost Classification*

- Because Flat Rock does not subtend to an SBC Tariff, reference to SBC's Access Tariff for transit and transport costs. However, such withdrawal is limited only to application to Flat Rock's Petition.<sup>73</sup>
- Verizon Wireless' assertion that the Appeals pending before the United States Circuit Court for the District of Columbia are expected to be decided by the first quarter of 2005.<sup>74</sup>

If required by the Commission, Verizon Wireless will re-file its Brief conforming the Brief with the above listed voluntary withdrawals.

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*Proceeding*, CC Docket No. 95-116; RM 8535, Memorandum Opinion and Order, 13 FCC Rcd 24495 (December 14, 1998); *Telephone Number Portability*, CC Docket No. 95-116; RM 8535, Third Report and Order, 13 FCC Rcd 11701 (May 5, 1998).

<sup>73</sup> As it applies to Flat Rock, Verizon Wireless withdraws the following text, and associated footnotes, from page 36 of its Brief:

In Petitioners' Exhibit 1, Attachment 1, Many of the Petitioners subtend to an SBC tariff and list certain SBC rates for Tandem Transiting. However, the corresponding rates in SBC's Tariff Ill. C.C. No. 21 are considerably lower than the rates cited by Petitioners.

	Petitioners' Basis	SBC's Rates	Percentage Overstated
Tandem Switching	\$ 0.004836	\$ 0.001033	468.15%
Tandem Transport Facility	\$ 0.000093	\$ 0.000040	232.50%

Petitioners' overstatement of these rates casts doubt on all of the rates and assumptions made by Petitioners in its cost estimates.

This is in response to Paragraph 14 of Flat Rock's Motion to Strike. Verizon Wireless also withdraws the line "Staff did not independently verify the SBC Tandem access rates Petitioner relied on or he would have had even more concerns regarding the calculations." Verizon Wireless Brief, p. 31; *See*, Flat Rock Motion to Strike, ¶ 17.

<sup>74</sup> Verizon Wireless withdraws the following text appearing on page 44 of its Brief, "Given the November 2004 oral argument date, a decision in the case is expected in the first calendar quarter of 2005"; *See*, Flat Rock Motion to Strike, ¶ 20.

## **XII. CONCLUSION**

Flat Rock asks this Commission to impose the most draconian penalty upon Verizon Wireless, to strike the Brief of Verizon Wireless in its entirety. To do so would force this Commission to consider Flat Rock's Petition without the benefit of any view from companies or their consumers who stand to loose if an additional suspension of Flat Rock's intermodal LNP requirement is granted. Even if this Commission agrees with any of the arguments made by Flat Rock in its Motion, there are two alternatives available to the Commission that would protect everyone's due process rights and allow the Commission to consider all viewpoints in making its determination:

1. Reopen the record to allow the proper amount of time for cross-examination of all witnesses while limiting a witness to one response to a question<sup>75</sup>; or,
2. Deny Flat Rock's motion while noting for the record that Flat Rock's concerns will be taken into account in giving proper weight to Verizon Wireless' arguments.

WHEREFORE, Verizon Wireless respectfully requests that the Illinois Commerce Commission (1) deny Flat Rock's Motion to Strike, (2) deny Flat Rock's request for a two-and-one-half-year suspension of its LNP obligation for the reasons set forth in Verizon Wireless' brief, and (3) require Flat Rock to provide LNP no later than November 24, 2004.

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<sup>75</sup> Any slight delay in the schedule that might be required to facilitate incorporation of this important information in the record, and its consideration by the ALJ and the Commission is far preferable than the possible alternative of denying customers access to LNP and to the benefits of number conservation for two and one half years, based upon an incomplete record.

Respectfully submitted,

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Attorneys For Verizon Wireless



**STATE OF ILLINOIS**  
**BEFORE THE ILLINOIS COMMERCE COMMISSION**

\* \* \* \* \*

Flat Rock Telephone Co-Op	)	
	)	
Petition for Suspension or Modification of	)	Docket No. 04-0181
Section 251(b)(2) requirements of the Federal	)	
Telecommunications Act pursuant to Section	)	
251(f)(2) of said Act; for entry of Interim Order;	)	
and for other necessary relief.	)	

**RESPONSE IN OPPOSITION TO MOTION TO STRIKE**  
**ALL OR PART OF VERIZON WIRELESS' BRIEF**

**ATTACHMENT A**

**COMPLETED PROPOSED ORDER OF VERIZON WIRELESS**

**STATE OF ILLINOIS**  
**BEFORE THE ILLINOIS COMMERCE COMMISSION**

\* \* \* \* \*

<u>Flat Rock Telephone Co-Op, Inc.</u>	)	
	)	
Petition for Suspension or Modification of	)	
Section 251(b)(2) requirements of the Federal	)	Docket No. 04- <u>0181</u>
Telecommunications Act pursuant to Section	)	
251(f)(2) of said Act; for entry of Interim Order;	)	
and for other necessary relief.	)	

**PROPOSED ORDER OF THE COMMISSION**

**SUBMITTED BY VERIZON WIRELESS**

By the Commission:

**I. INTRODUCTION**

On March 1, 2004, Flat Rock Telephone Co-Op, Inc. ("Petitioner") filed with the Illinois Commerce Commission ("Commission") a Verified Petition pursuant to §251(f)(2) of the Federal Telecommunications Act of 1996 ("TA 96"), 47 U.S.C. 151 et seq. Petitioner seeks an Order suspending or modifying the Local Number Portability requirement imposed by Section 251(b)(2) of the TA 96. On May 11, 2004, the Commission entered, as requested by Petitioner, an Interim Order suspending any obligation of the Petitioner to provide intermodal LNP until a final order is entered in this proceeding.

On April 20, 2004, Verizon Wireless filed a Petition for Leave to Intervene in this proceeding, noting its objection to the Petitioner's request for an Interim Order suspending the requirement that the Petitioner provide intermodal LNP.

Pursuant to due notice, hearings were held in this matter before a duly authorized Administrative Law Judge of the Commission at its offices in Springfield, Illinois on April 1, 2004, April 5, 2004, April 27, 2004, at which the intervention of Verizon Wireless was granted, and June 9, 2004. Appearances were entered by counsel on behalf of Petitioner, Commission Staff ("Staff"), and Verizon Wireless. No other appearances were entered. Petitioner, Staff, and Verizon Wireless each presented testimony and other evidence in support of their positions. At the end of the June 9, 2004 hearing, the record was marked "Heard and Taken." On June 30, 2004, the parties submitted briefs and proposed orders. On July \_\_, 2004, the Administrative Law Judge served a proposed order on the Petitioner, Staff, and Verizon Wireless.

## II. BACKGROUND.

Petitioner is a telephone Company and a facilities based incumbent local exchange carrier (“ILEC”) providing local exchange telecommunication services as defined in §13-204 of the Public Utilities Act (“ACT”), 220 ILCs 5/1-101 et seq., and is subject to the jurisdiction of the Commission except as limited by §13-701 of the Act. Petitioner provides service in the Flat Rock exchanges. Petitioner’s service area consists of approximately 36 square miles in which it provides service to approximately 532 access lines. Petitioner claims that its service territory is sparsely populated with Petitioner having approximately 15 customers per square mile. Petitioner is a “rural telephone company” within the meaning of Section 153(37) of the TA 96 and Section 51.5 of the Rules of the Federal Communications Commission (“FCC”). As a rural telephone company, Petitioner possesses a rural exemption under Section 251(f)(1)(A) of the TA 96 from the requirements of Section 251(c) of the TA 96. Petitioner is also “a local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide” within the meaning of Section 251(f)(2) of the Act.

## III. GOVERNING LAW.

Section 251(b)(2) of the TA 96 provides in part:

(B) obligations of all local exchange carriers. —Local Exchange Carrier has the following duties:

\* \* \*

(2) Number Portability.—The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the [FCC].

In implementing its authority, the FCC, on November 10, 2003, released a *Memorandum Opinion and Order and Further Notice of Proposed Rule-Making* in CC Docket No. 95-1160 (“FCC Order”). As it pertains to the Top 100 MSAs, the FCC Order concludes, in part, at paragraph 22 as follows:

We conclude that, as of November 24, 2003, LECs must port numbers to wireless carriers where the requesting wireless carrier's “coverage area” overlaps the geographic location of the rate center in which the customer’s wireline number is provisioned, provided that the porting-in carrier maintains the number's original rate center designation following the port.

The FCC continued, at paragraph 29, to extend the date for implementation of intermodal LNP for carriers outside the Top 100 MSA, such as the Petition to May 24, 2004:

Therefore for wireline carriers operating in areas outside of the 100 largest MSAs, we hereby waive, until May 24, 2004, the requirement that these carriers port numbers to wireless carriers

that do not have a point of interconnection or numbering resources in the rate center where the customer's wireline number is provisioned. We find that this transition period will help ensure a smooth transition for carriers operating outside of the 100 largest MSAs and provide them with sufficient time to make necessary modifications to their systems.

Previously, however, the FCC adopted 47 C.F.R. 52.23(c), which also concerns LNP and provides that:

(c) Beginning January 1, 1999, all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.”

Despite the FCC’s rules, though, 2% carriers may seek additional suspension of LNP requirements pursuant to Section 251(f)(2) of the TA 96. This section states:

(2) Suspensions and modifications for rural carriers.—A Local Exchange Carriers with fewer than two percent of the Nation’s subscriber lines installed in the aggregate nationwide may petition a state commission for a suspension or modification of the Application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The state commission shall grant such petition to the extent that, and for such duration as, the state commission determines that such suspension or modification—

(A) is necessary—

“(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

“(ii) to avoid imposing a requirement that is unduly economically burdensome; or

“(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenient, and necessity.

The state commission shall upon any petition, filed under this paragraph within 180 days after receiving such petition. Pending such action, the state commission may suspend enforcement of the requirements or requirements to which the petition applies with respect to the petitioning carrier or carriers.

#### **IV. PARTIES' POSITION.**

##### **A. Petitioner's position.**

As a general matter, Petitioner states that it provides to its customers the services they want when a sufficient number of customers desire the service and all of its customers are willing to pay the associated costs. Petitioner does not believe that it should be required to provide what it characterizes as a discretionary service such as intermodal LNP and to incur the associated costs until its customers want it to do so. The Petitioner contends that demand for intermodal LNP does not exist, and basis this contention on the Petitioner's knowledge of its customer base. Absent this Commission's Interim Order suspending the FCC's requirements that the Petitioner provide intermodal LNP, the Petitioner would be required to do so because the Petitioner received requests for LNP from Verizon Wireless and other wireless carriers. Copies of these requests have been entered into the record.

Petitioner's position is that it should not be required to provide intermodal LNP within its serving area until such time as any operational, and administrative, and technical problems associated with its provision have been resolved on a more global basis by the large ILECs, such as SBC and the wireless carriers requesting number portability. Petitioner believes that it is significant that no telecommunications carrier has asked the Commission to terminate Petitioner's rural exemption pursuant to the provisions of Section 251(f)(1)(B) of the TA 96, and that a staff inquiry to unnamed sources at two LECs indicated a low take rate for intermodal local number portability for the first month in which it was available in those carriers' service areas. These facts, Petitioner argues, evidence the lack sufficient demand for LNP service from competitive providers. The Petitioner also indicates that it lacks experience in providing LNP and would have to incur new costs to provide LNP now.

Companies such as SBC, on the other hand, have been providing some type of LNP for a number of years, according to the Petitioner. Those companies, Petitioner observes, have already made the incremental investment to provide LNP and have trained employees and have had ongoing business experience as a provision of at least some type of LNP. Petitioner asserts that statements from the FCC, news stories, and the trade press have made it clear that there are indeed operational, administrative, and technical problems that need to be worked through on an industry basis.

In Petitioner's view, from a policy and industry perspective, this would appear to be similar to the situation when customers were initially allow to presubscribed to interexchange carriers. Petitioner states that presubscription was initially implemented by the large carriers, such as the Regional Bell Operating Companies; and the operational, and administrative, and technical difficulties associated with presubscriptions were worked out over a period of time between those large ILECs and the large interexchange carriers, such as AT&T, MCI, and Sprint. In connection with determinations Primary Toll Carrier Plan in Illinois, Petitioner relates that the Commission provided a different and subsequent time table of presubscription for small companies, such as the Petitioner, after experience had been gained from the larger companies.

From a technical perspective, Petitioner indicates that the current generic software contained in its host switch will accommodate number portability, but that the feature has not been “loaded” or “activated.” Personnel from the switch manufacturer would, according to Petitioner, have to load and activate the capability, as well as make translations in switches and perform testing and verification. An agreement with a vendor to provide LNP service or administration services would also be necessary, Petitioner contends. Since at least calls to ported numbers and long distance calls would need to have a database dip in connection with the provision of number portability, Petitioner further asserts that an application will have to be filed with NPAC, the national provider of that service, to obtain NPAC management system services. Petitioner believes that operational support systems would need to be reviewed and modified as well. Technical training for its employees, Petitioner continues, would also be necessary.

With regard to implementing intermodal LNP, Petitioner reports that the FCC’s orders and rules do not require a wireless carrier to have a point of presence within Petitioner’s serving area, nor do they require the wireless carrier to establish direct trunks to Petitioner for the purpose of delivering calls. Since no wireless carrier has a point of interconnection or numbering resources in any exchange or rate center within its serving area, Petitioner believes, based upon the FCC’s current requirements, that all calls from one of its wireline customers to customers that choose to port their numbers to a wireless carrier would have to be transported to the tandem provider for delivery to the wireless carrier. Petitioner states that the routing of a call to a location outside of its local calling area would normally lead to such a call being rated as an interexchange call or toll call. However, Petitioner concedes that FCC rules require a ported call to be rated as a local call if it was previously rated as a local call since the customer’s rate center designation will not change.

Additionally, Petitioner argues that it should in no event be required to provide wireline - to-wireless LNP until such time as regulatory decisions have been made and mechanisms put in place that will allow it to recover all of its costs associated with the provision of intermodal LNP. Petitioner complains that the FCC’s orders to date, including the November 10, 2003 FCC Order, fail to address how numerous significant costs, such as the cost of transporting calls to wireless points of interconnection outside of the ILEC’s serving area and associated transiting or tandem switching costs, will be recovered. While it is Petitioner’s belief that those costs should not be borne by it or its customers, Petitioner states that no regulatory decision by the FCC or this Commission has been made as to how those costs will be recovered and mechanisms put in place to allow for such recovery. However, the Petitioner acknowledges that the FCC did not stay the implementation of its LNP order pending such a determination.

While it does not believe that it or its customers should be responsible for the transport and transiting costs associated with delivering calls to wireless carriers, for purposes of evaluating the economic burden in this proceeding, Petitioner has assumed it, and ultimately its customers, will be responsible for such costs. Though the Petitioner does not seek Commission approval of any type of end user surcharge or to otherwise increase rates associated with the provision of intermodal LNP, the Petitioner has estimated a per-customer monthly charge using a model based on cost support filed and approved by the National Exchange Carrier Association (“NECA”) in an LNP filing it made with the FCC in NECA’s Transmittal No. 956.

Petitioner calculates that initial LNP startup costs and certain ongoing expenses over a five year period amount to \$80,566.00 before applying present value factors. After applying present value factors, the cost is \$72,784.00. To recover its costs, Petitioner states that it would have to recover \$3.37 per month from each access line over a five year period. Attachment 1 to Petitioner's Direct Testimony shows how Petitioner arrived at these cost estimates. In light of these costs, Petitioner argues that a suspension or modification of any obligation it may have to provide intermodal LNP necessary to avoid a significant adverse economic impact on its customers and that the granting of such further suspension is consistent with the public interest, convenience, and necessity. The Petitioner disagrees with certain adjustments made to its costs by Staff.

Once any cost and technical matters are resolved, Petitioner states further that it should not have to provide intermodal LNP until between six and ten percent of its customers indicate desire for intermodal LNP.

## **B. Staff's Position.**

In making its recommendation, Staff focuses on Section 251(f)(2)(A)(i) of the TA 96 as the most directly applicable of the three standards that appear in Section 251(f)(2)(A). The Staff explains that FCC rules, specifically 47 CFR §§52.21-52.33, provide that the Petitioner may recover LNP related costs from any users (on a per access line basis as prescribed in the rules) over a period of five years. Staff understands that Petitioner will recover its costs if and when it is required to implement intermodal LNP. Since costs associated with intermodal LNP will be borne by Petitioner's customers generally, Staff asserts that a central question for the Commission is whether such costs would cause "significant adverse economic impact on users of telecommunications services generally." In this specific application of Section 251(f)(2)(A)(i), Staff states that the phrase "users of telecommunications services generally" is best understood to refer to the general body of Petitioner's subscribers thus, while Section 251(f)(2)(A)(ii) also may apply, Staff believes that the fact that intermodal LNP costs be borne largely by end users warrants that Commission focus on Section 251(f)(2)(A)(i). Staff also asserts that Section 251(f)(2)(A)(iii) is not at issue in this proceeding since deployment of intermodal LNP by Petitioner is technically feasible.

With regard to the cost burden on end user customers and Petitioner, Staff states that there are two cost-related circumstances that are of concern. First, Staff notes that the Petitioner does not currently provide wireline to wireline LNP. Because of those facts Staff relates that the Petitioner would need to recover all LNP related costs for the sole purpose of providing intermodal LNP. This is in contrast, Staff observes to carriers that already have deployed LNP capabilities pursuant to a request by another wireline carrier and whose incremental cost of extending the capabilities to wireless carriers is minimal at best. Second, Staff agrees with Petitioner that the issue of cost recovery for transit and transport has not yet been resolved. Because of its current routing arrangements, all calls from Petitioner's local exchange customers to numbers that have been ported (from Petitioner to wireless carriers) would incur routing and transport costs. Without a recovery mechanism in place, Staff indicates that it cannot be determined how these costs will impact the Petitioner or its end users. Staff agrees with Petitioner that these costs may not be trivial.

In an attempt to determine whether Petitioner's customers would experience a significant adverse economic impact, Staff reviewed Petitioner's costs estimates associated with providing intermodal LNP. Staff questioned Petitioner's characterization of some costs and Petitioner's estimates of other costs. As a result of its analysis Staff initially reduced the Petitioner's cost analysis from \$3.37 to \$2.30 per subscriber line per month. Staff emphasizes this figure is not a recommended rate for an LNP surcharge, and that Staff does not have any authority to approve such a surcharge, but rather is a means to gauge the impact of intermodal LNP on end users.

Staff also questioned Petitioner's inclusion of transiting and transport charges in its estimated LNP surcharge cost analysis. Staff also expressed concern whether or not it was even appropriate to include transiting and transport costs in the LNP surcharge in light of: 1) the "uncertainty with respect to who is ultimately responsible for transport and transiting costs associated with porting numbers from the LECs to wireless carriers"; 2) the fact that the "the FCC's order mandating LNP to wireless carriers determined that issue was outside the scope of that proceeding; and, 3) the fact that "the levels of transport and transit costs are very sensitive to the assumptions about the number of customers who elect to port their number to a wireless carrier and the amount of usage of those customers." Staff also found inconsistencies and uncertainties in the Petitioner's estimate of transiting and transport charges, including misstatements of the SBC tariff rates for such services. Staff provided a second scenario in which transiting and transport charges were removed. This scenario further reduced the Petitioner's estimated LNP surcharge to \$2.18 per subscriber line per month.

Because Staff is not aware of any quantitative or precise measures (or any generally accepted methodology) to determine whether a given level of costs or charges would cause "significant adverse economic impact on users of telecommunications services generally," Staff recommends that careful application of judgment on a case specific basis. Staff compares the Petitioner's estimated LNP surcharge, of \$3.37 per access line per month, and the Staff Scenario including transiting and transport, of \$2.30 per access line per month to SBC's charge of \$0.28 for access line per month. Staff did not compare the scenario that removes the estimated transiting and transport charges. Staff points out that the estimated per line surcharge for Petitioner is higher than the comparable figure for SBC. In this instance, Staff therefore concludes that the application of judgment warrants a temporary suspension of intermodal LNP requirements.

### **C. Verizon Wireless' Position.**

Verizon Wireless notes that this Petition is essentially identical in both content and in its position and testimony to thirty-nine (39) other petitions for suspension of intermodal LNP that have been filed with this Commission. Verizon points out several ways that this petition, and the others, failed to meet the applicable legal standards set forth in Section 251(f)(2) of the TA 96. Verizon Wireless also points out numerous flaws and inflations contained in the Petitioner's costs analysis.

The FCC assigned the burden of proof in a suspension request, under Section 251(f)(2) of the TA 96, to the Petitioner in 47 C.F.R. §251.405(b). The Petitioner has failed to demonstrate how a suspension is necessary to avoid adverse impacts on the Petitioner, the Petitioner's



customers, wireless carriers, and customers of wireless carriers. Verizon Wireless disagrees with the Petitioner and Staff's application of the term "users of telecommunications services generally" from Section 251(f)(2)(a)(i) of the TA 96. Based on rules of grammatical construction, legislative intent, and statutory construction the word "generally" cannot mean that the Commission should look only at users of Petitioner's service. Rather the word "generally" means that the Commission must examine the impact of a suspension on users of telecommunications services who would be affected by an additional suspension. The Petitioner failed to raise or prove that a suspension would have an adverse impact on anyone but the Petitioner and the Petitioner's users. Verizon Wireless also noted that the Petitioner failed to raise or prove any grounds for suspension under Sections 251(f)(2)(A)(ii) and 251(f)(2)(A)(iii).

Verizon Wireless also raised concerns that the Petitioner and Staff failed to examine various public interest standards which this Commission must consider. This Commission must consider the fact that LNP has already been determined by the FCC and this Commission to be in the public interest. This Commission must consider the fact that LNP optimizes number resources, which is in the public interest. This is especially important as the Petitioner operates in an NPA which has been declared to be in jeopardy by the North American Numbering Plan Administrator. The Commission must consider the public interest the advancement of competition that will be fostered by LNP—a long stated goal of, and a statutory requirement imposed on, this Commission. Additionally, Verizon Wireless contends that the Commission must consider the adverse impact an additional suspension would have on the public interest because of consumer confusion caused the fact that some residents of the state will be able to port their telephone numbers and other residents will not, creating a patchwork approach to a Federal mandate designed to benefit all consumers.

Verizon Wireless points out that several Illinois ILECs are currently offering, or required to offer, intermodal LNP in their service territories. These carriers include SBC Illinois, Verizon North, Inc., Verizon South, Inc., Bergen Telephone Company, Chandlerville Telephone Company, Citizens Telephone Company, Clarksville Mutual Telephone Company, Frontier Communications, Inc., Gallatin River Telephone Company, Geneseo Telephone Company, Illinois Consolidated Telephone Company, Randview Mutual Telephone Company, and Sharon Telephone Company. These carriers, some of which are similarly situated to the Petitioner, are able to offer intermodal LNP without incurring significant adverse economic impacts claimed by the Petitioner.

Verizon Wireless notes that the Petitioner included with its testimony, copies of correspondence from Verizon Wireless and other wireless carriers that demonstrate that Verizon Wireless sought to have LNP made available in the Petitioner's service territory. The Petitioner ignored these communications. The Petitioner specifically requested that the Commission not decide whether or not these communications constitute bona fide requests ("BFRs"). The Petitioner failed to take any steps to fulfill its LNP obligations, required by these BFRs, in a timely manner.

Verizon Wireless points out that the Petitioner contends that it should not be required to provide intermodal LNP until there is a demonstrated demand. However, demand for the service is not determinative of the public interest and is not the legal standard to be met in order to

qualify for a suspension from LNP. Moreover, Petitioner's claim that there is no demand for LNP is not based on substantial or credible evidence. Petitioner has not taken any formal steps to quantify or measure if there is any demand in its service territory. Intermodal LNP is a new, forward-looking requirement that seeks to spur competition among carriers and in the local exchange market. The availability and marketing of LNP will create its own demand once consumers begin to realize the benefits of competition.

Verizon Wireless questions the cost analysis provided by the Petitioner. Verizon Wireless cited to several FCC standards for determining the appropriate amount of any LNP surcharge on customers. As noted by Verizon Wireless the FCC requires that only carrier specific costs directly related providing number portability can be recovered through an LNP surcharge. Verizon Wireless recommends that the reductions applied by Staff be applied to the Petitioner's cost analysis before the Commission considers the amount of any LNP surcharge in this proceeding. Verizon Wireless also notes that the FCC separated considerations regarding routing calls from the obligation to provide LNP. Therefore, this Commission should not consider transiting and transport costs in any analysis of the impact of an LNP surcharge upon the Petitioner's customers. Furthermore, Verizon Wireless points out the gross overstatement of SBC rates for tandem transiting contained in the Petitioner's cost analysis for transiting and transport and supports Staff's skepticism regarding these numbers in general.

When transiting and transport is removed from the equation, the Petitioner's estimated LNP surcharge is reduced to \$2.18, per subscriber per month. Verizon Wireless concludes that this amount is not significantly more than those LECs who already have LNP surcharges, and would not be a significant adverse impact on the Petitioner's customers and certainly not on "users of telecommunications services generally."

Further, the Petitioner has taken no steps to minimize the impact of its direct costs of providing LNP by petitioning the FCC for additional time over which to amortize these costs. The FCC has recently been receptive to such requests.

Verizon Wireless points out that Staff's policy witness failed to analyze the LNP surcharge with transiting and transport costs removed. Staff's policy witness also relied on the Petitioner's position without independently verifying or examining assumptions made by the Petitioner. Staff's policy witness provided the exact same testimony in each suspension proceeding for this Commission, despite a statutory obligation for this Commission to examine such petitions on a case-by-case basis.

Verizon Wireless raises numerous procedural arguments regarding this and other petitions for further suspension from LNP obligations. Among these arguments is that the petitions rely almost exclusively on five initial cases which were settled by the Petitioners and Staff without input from any wireless carriers, and are currently the subject of rehearings before this Commission. Verizon Wireless also argues that the grant of the petition along with the other pending petitions would constitute a blanket waiver, not permitted by statute, and would constitute an improper collateral attack on the FCC's Number Portability Orders.

Verizon Wireless recommends that the Commission deny Petitioner's request for an additional suspension, and require the Petitioner to provide local number portability as soon as practicable, but no later than November 24, 2004. In addition, Verizon Wireless requests that the Commission order the Petitioner to provide periodic updates on the progress it is making toward such provision.

## **V. COMMISSION CONCLUSION**

For reasons cited by Verizon Wireless, the Commission finds that further suspension of the requirement to provide intermodal LNP pursuant to Section 251(b)(2) of the TA 96 is not warranted. Specifically the Commission concludes that the Petitioner failed to meet its burden of proof that the requirement to provide LNP would impose a significant adverse economic impact on users of telecommunications services generally and has failed to prove that a further suspension would be in the public interest. In addition, because the FCC has not authorized the inclusion of transiting and transport costs in an LNP surcharge, and limits the composition of an LNP surcharge to those costs directly incurred by the carrier in providing LNP, the Commission has examined the various costs analysis provided to it and finds that the Staff scenario presented without transiting and transport is more reasonable and does not demonstrate an adverse economic impact. The Commission hereby extends its previously entered Interim Order until November 24, 2004 for Petitioner to conclude any implementation tasks. To ensure that the Petitioner is making progress towards completing its implementation of LNP by that date, the Commission hereby requires the Petitioner to file progress reports with the Commission, in this Docket, on October 1, 2004 and on November 1, 2004.

## **VI. FINDINGS AND ORDERING PARAGRAPHS.**

The Commission, having considered the entire record herein, is of the opinion and finds that:

- (1) Petitioner is a telecommunications carrier as defined in §13-202 of the Act providing telecommunications services to customers in Illinois;
- (2) The Commission has jurisdiction over the parties hereto and the subject matter hereof;
- (3) The facts were cited and conclusions reached in the prefatory portion of this Order or supported by the record and are hereby adopted as findings of fact and law;
- (4) Petitioner's request, pursuant to §251(f)(2) of the TA 96, a further suspension of any intermodal LNP obligations applicable to Petitioner under §251(b)(2) of the TA 96 is hereby denied;
- (5) The temporary suspension previously entered in this proceeding shall expire on November 24, 2004;

- (6) As of November 24, 2004, the Petitioner must port numbers to wireless carriers where the requesting wireless carrier's "coverage area" overlaps the geographic location of the rate center in which the customer's wireline number is provisioned, provided that the porting-in carrier maintains the number's original rate center designation following the port;
- (7) The Petitioner shall file, in this docket, status reports indicating its progress towards providing LNP on October 1, 2004 and on November 1, 2004; and
- (8) All motions, petitions, objections, and other matters in this proceedings which remain unresolved should be disposed of consistent with the conclusions herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Flat Rock Telephone Co-Op, Inc. shall make intermodal local number portability under §251(b)(2) of the Federal Telecommunications Act of 1996 and under the Federal Communications Commission's Orders available on November 24, 2004.

IT IS FURTHER ORDERED that the Temporary Suspension granted to Flat Rock Telephone Co-Op, Inc. shall expire on November 24, 2004.

IT IS FURTHER ORDERED that Flat Rock Telephone Co-Op, Inc. shall file with the Illinois Commerce Commission, in this docket, status reports indicating its progress in implementing local number portability on October 1, 2004 and on November 1, 2004.

IT IS FURTHER ORDERED that all motions, petitions, objections, and other matters in this proceeding which remain unresolved are disposed of consistent with conclusions herein.

IT IS FURTHER ORDERED that subject to the provisions of 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this \_\_\_\_ day of \_\_\_\_\_, 2004.

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Chairman

**STATE OF ILLINOIS**  
**BEFORE THE ILLINOIS COMMERCE COMMISSION**

Flat Rock Telephone Co-Op	)	
	)	
Petition for Suspension or Modification of	)	
Section 251(b)(2) requirements of the Federal	)	Docket No. 04-0181
Telecommunications Act pursuant to Section	)	
251(f)(2) of said Act; for entry of Interim Order;	)	
and for other necessary relief.	)	

**NOTICE OF FILING**

To: Parties of Record

You are hereby notified that I have, this 9<sup>th</sup> day of July, 2004, filed with the Chief Clerk of the Illinois Commerce Commission the Response in Opposition to Motion to Strike All or Part of Verizon Wireless' Brief on behalf of Verizon Wireless, in the above-captioned proceeding, via the electronic e-docket system.

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Haran C. Rashes  
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Response in Opposition to Motion to Strike All or Part of Verizon Wireless' Brief on behalf of Verizon Wireless, in the above-captioned proceeding, were served upon the parties on the attached service list via electronic mail on July 9, 2004.

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**Docket No. 04-0181**

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